A **LUCY WONG NYUK KING & ANOR v. HWANG MEE HIONG**

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
AB KARIM AB JALIL JCA
STEPHEN CHUNG JCA
B [CIVIL APPEAL NO: Q-02(IM)-1127-06-2017]
3 FEBRUARY 2020

CIVIL PROCEDURE: *Striking out – Appeal against – Appeal against striking out of notice of assessment of damages – Preliminary objection raised – Whether O. 37 of Rules of Court 2012 applicable to assessment by High Court Judge – Whether assessment before High Court Judge similar to assessment before Senior Assistant Registrar – Whether Judicial Commissioner required to fully hear notice of assessment and ought not to entertain further preliminary objections – Whether appeal ought to be allowed*

D On 1 March 2010, the plaintiffs filed an originating summons for the removal of a private caveat lodged by the defendant on the plaintiffs' land and for compensation and damages under s. 177 of the Sarawak Land Code ('SLC'). On 16 August 2010, the High Court Judge dismissed the OS. The plaintiffs' appeal against that decision was allowed ('COA order'). After the COA order E was granted, the plaintiffs applied for the assessment of damages *vide* notice of appointment of assessment of damages in encl. 68. The defendant objected to the notice of assessment of damages and applied to set it aside. The High Court Judge ('HCJ') allowed the defendant's application. The plaintiffs then appealed to this court against the order of the High Court in setting aside F encl. 68. On 16 February 2017, this court allowed the plaintiffs' appeal and reinstated encl. 68 for hearing. On 28 April 2017, encl. 68 was set for hearing before the Judicial Commissioner ('JC'). The defendant raised a preliminary objection to encl. 68 on the ground that the plaintiffs had not complied with the provisions of O. 37 of the Rules of Court 2012 ('ROC'). The plaintiffs G raised a preliminary objection to the defendant's preliminary objection by reason of the defendant's preliminary objection not being permissible under O. 2 r. 2 and r. 3 of the ROC. The plaintiffs further submitted that, as the COA order had ordered damages to be 'assessed by the court or by the Deputy Registrar or the Senior Assistant Registrar', O. 37 of the ROC did H not apply because O. 37 was only related to matters before the Registrar and not before a judge. Having heard the parties, the JC found that the plaintiffs' preliminary objection had no basis and since the plaintiffs had failed to comply with O. 37 r. 1(1) and r. 1(6) of the ROC, it followed that encl. 68 filed by the plaintiffs was defective and incompetent before him for non-compliance, in that no directions were given pursuant to O. 37 r. 1(1) I of the ROC. The JC therefore allowed the preliminary objection by the defendant and proceeded to strike out encl. 68. Hence, the plaintiffs appealed. The issue to be determined was whether an assessment before the

HCJ was the same as an assessment before the Senior Assistant Registrar ('SAR') or whether O. 37 of the ROC was relevant/applicable to an assessment by the HCJ.

Held (allowing appeal)
Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:

(1) On 16 February 2017, this court had allowed the plaintiffs' appeal against the setting aside of encl. 68, and as a result of allowing the appeal, the court had in effect reinstated encl. 68. The JC was required to hear fully encl. 68 and should not have entertained further preliminary objections raised by the defendant. However, the JC continued to hear the defendant's preliminary objection and allowed it and thus encl. 68 was struck out. The JC had overruled/ignored/countermanded this court's decision dated 16 February 2017 when he had no jurisdiction to do so. For this reason alone, the plaintiff's appeal ought to be allowed. (para 22)

(2) There is a difference between a HCJ and the Registrar/SAR. Order 37 of the ROC provides for the assessment of damages before the Registrar. Order 37 does not provide a different meaning to the term 'Registrar' to include a Judge of the High Court. Therefore, resort must be made to the general definition provision as provided in O. 1 r. 4 of the ROC to that term 'Registrar'. It could therefore be clearly seen that the SAR is included in the term 'Registrar' but definitely does not include the High Court Judge/JC. Moreover, the COA order had ordered damages to be 'assessed by the court or by the Deputy Registrar or the Senior Assistant Registrar': this could only mean that this court had ordered the assessment of damages to be before a Judge/JC of the High Court as one of the possibilities. (para 23)

(3) As O. 37 of the ROC generally does not apply to the plaintiffs' case, the plaintiffs were at liberty to pursue the same application in encl. 68 before the JC, and by virtue of O. 37 r. 4, it is provided that 'where the court orders that the action shall proceed to trial, O. 34 (pre-trial case management) shall apply with the necessary modifications'. In conclusion, the issue posed by the plaintiffs was answered in the negative. Thus, the High Court order was set aside and encl. 68 was ordered to be remitted back to the High Court for hearing before the JC/Judge. (paras 24 & 25)

Case(s) referred to:
Tetuan Sri Ling & Associates v. Lian Meng Wah [2015] 3 CLJ 63 CA ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 17
Land Code (Sarawak) (Cap 81), s. 177
Rules of Court 2012, O. 1 r. 4(1), (2), O. 2 rr. 2, 3, O. 32 r. 9, O. 37 rr. 1(1), (6), 4(a), (b)

A *For the appellants - Tai Choi Yu; M/s Tai Choi Yu & Co Advocs*
For the respondent - Henry Ling; M/s Ling & Wong Advocs

[Editor's note: For the High Court judgment, please see Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong [2017] 1 LNS 2256 (overruled).]

B *Reported by Suhainah Wahiduddin*

JUDGMENT

Umi Kalthum Abdul Majid JCA:

C **History And Facts Of The Case**

[1] In order to understand fully the issues raised at hand in this appeal by the appellants/plaintiffs, the historical background of the matter needs to be appreciated. For ease of reference, we will refer the parties as they were in the High Court.

D **[2]** Towards this end, we have taken the liberty to refer to the plaintiff's counsel's submission which had laid out the historical background and facts of the case.

[3] On 1 March 2010, the plaintiffs filed an Originating Summons No. 24-11-2010 (OS) for the removal of a private caveat lodged by the defendant on E the plaintiffs' land and for compensation and damages under s. 177 of the Sarawak Land Code (SLC).

[4] On 16 August 2010, the learned High Court Judge dismissed the OS with costs to be taxed unless agreed. The plaintiffs appealed against that F decision *vide* Civil Appeal No. Q-02-2618-2010.

[5] On 12 April 2013, this court heard that Civil Appeal No. Q-02-2618-2010 and allowed the plaintiffs' appeal with costs of RM20,000 (see order at pp. 27 and 28, record of appeal) (COA order).

G **[6]** After the COA order was granted, the plaintiff applied for the assessment of damages *vide* notice of appointment of assessment of damages in encl. 68 (notice of assessment of damages, see p. 29, record of appeal) on 21 August 2013.

[7] The defendant objected to the notice of assessment of damages and H applied *vide* encl. 69 to set it aside.

[8] The learned High Court Judge allowed the defendant's application in encl. 69 and had set aside encl. 68.

[9] The plaintiffs appealed to this court against the order of the High Court I setting aside encl. 68 *vide* Court of Appeal Civil Appeal No. Q-02(IM)-701-04/2015.

[10] On 16 February 2017, this court allowed the plaintiffs' appeal against the setting aside of encl. 68 and reinstated encl. 68 for hearing.

[11] After encl. 68 was reinstated for hearing, the plaintiffs appeared before the High Court at Bintulu on 11 April 2017 where the matter was brought up before the Senior Assistant Registrar (SAR), Tuan Muhammad Hafiz bin Mohd Nor, who apologised to the parties and said as follows:

> Upon instruction from YAA CJSS, all assessment of damages to be heard by high court judges and the instruction is to take effect immediately and it includes all pending cases.

[12] On 28 April 2017, encl. 68 was set for hearing before the learned Judicial Commissioner (JC). Once again the defendant raised preliminary objection to encl. 68 on the ground that the plaintiffs had not complied with the provisions of O. 37 Rules of Court 2012 (ROC). The learned JC allowed the defendant's preliminary objection and proceeded to strike off encl. 68 with costs of RM800 (see draft order 28 April 2017, pp. 20-21, agreed record). Hence this appeal before us by the plaintiffs.

At The High Court

[13] As stated earlier, when encl. 68 was set for hearing before the learned JC, the defendant had raised preliminary objection to that enclosure. But on the date of hearing of encl. 68, the learned plaintiffs' counsel had raised preliminary objection to the defendant's preliminary objection by reason of the defendant's preliminary objection was not permissible under O. 2 r. 2 and r. 3 of the ROC. The plaintiffs further submitted that as the COA Order had ordered damages to be "assessed by the court or by the Deputy Registrar or the Senior Assistant Registrar", O. 37 of the ROC did not apply. This was because O. 37 only relates to matters before the Registrar and not before a judge.

[14] Other than stating that the plaintiffs had not complied with the provisions of O. 37, learned counsel for the defendant submitted that O. 2 r. 2 ROC only applies to cases where the complaint of irregularity is based on the evidence of alleged non-compliance. The defendant was not raising preliminary objection on that point. Further, O. 2 r. 3 ROC does not prohibit all preliminary objections.

[15] Having heard the parties, the learned JC found that the plaintiffs' preliminary objection had no basis as O. 2 r. 2 of the ROC did not apply to the preliminary objection raised by the defendant. That the defendant's objection pertained to the non-compliance of a mandatory provision of the ROC, that is, O. 37. In any event, O. 2 r. 2 pertains to application to set aside for irregularity. As for O. 2 r. 3, the learned JC was of the view that it does not prohibit preliminary objections outright; the court still has to consider the grounds of objections before deciding whether to allow it or not. Further,

O. 2 r. 3 does not require a notice of application to be filed first before an objection could be entertained. The learned JC therefore found no merits in the plaintiffs' objections and dismissed it.

[16] The learned JC then proceeded to consider the defendant's preliminary objection. It would appear that learned counsel for the plaintiffs raised the same issues as he did in the plaintiffs' preliminary objection against the defendant's preliminary objection. To this end, the learned JC referred to this court's decision in *Tetuan Sri Ling & Associates v. Lian Meng Wah* [2015] 3 CLJ 63 and quoted the following passage:

> [52] Having considered the circumstances leading to the order made by the learned judge in respect of encl. 48, it would seem clear that there is serious non-compliance with O. 37 on the part of LMW as regards the procedure that is required to be followed relating to assessment of damages. There was indeed no explanation proffered by LMW on the non-compliance with the law and the long delay of almost three years to file the notice of appointment for assessment of damages. In our judgment, the learned judge clearly had erred when she proceeded to assess the damages and decided that the quantum was sufficiently proven relying only on the affidavit of LMW especially when no directions had been given by the learned SAR as required under O. 37 r. 1(1) of the Rules of Court 2012.

The learned JC then concluded that it was clear from the above quotation, O. 37 ROC also applies to a judge or JC. The learned JC then stated as follows:

> [24] The fact that the assessment of damages herein was before a judge or judicial commissioner did not mean that the requirements in O. 37 ROC could be dispensed with. The procedure relating to assessment of damages must be complied. Failure to do so tantamount to a serious non-compliance.
>
> [25] Further, the definition of a 'judge' in O. 1, r. 4 ROC states that:
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> > "judge" means a Judge or Judicial Commissioner of the High Court and includes where he is empowered to act, a Judge of the Sessions Court, a Magistrate or a Registrar, as the case may be.
>
> [26] In other words, a Judge or a Judicial Commissioner may act as a Registrar under O. 37 ROC.
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> [27] That said, the question that needed to be answered was, whether the plaintiffs had complied with the mandatory requirements of O. 37 ROC before filing encl. 68.
>
> [28] The answer to that question was in the negative.

[17] Based on the decision of this court in *Tetuan Sri Ling & Associates (supra)*, the learned JC found that since the plaintiffs had failed to comply with O. 37 r. 1(1) and r. 1(6) ROC, it followed that encl. 68 filed by the

plaintiff was defective and incompetent before him for non-compliance, in that no directions were given pursuant to O. 37 r. 1(1) ROC. The learned JC therefore allowed the preliminary objection by the defendant and proceeded to strike out encl. 68 with costs to the defendant.

The Appeal

[18] At the outset of the hearing of this appeal, the defendant raised a preliminary objection on the fact that the first plaintiff is an undischarged bankrupt and therefore this appeal was incompetent and this court had no jurisdiction to hear the appeal. Upon learned counsel for the plaintiffs producing to this court a copy of a letter from the Insolvency Department, Miri Branch reference number BP013801/2016 dated 16 October 2018 stating that the Director General of Insolvency had given his sanction to the first plaintiff to "memulakan atau meneruskan tindakan di Mahkamah Rayuan Persekutuan Malaysia bagi tindakan di Mahkamah Rayuan Persekutuan Malaysia bagi Guaman No: Q-02(IM)-1127-06/2017 serta melantik Tetuan Tai Choi Yu & Co, Advocates untuk mewakili tuan dalam tindakan guaman dan rayuan-rayuan yang berbangkit daripada kes ini …", learned counsel for the defendant withdrew his preliminary objection and this court proceeded with the plaintiffs' appeal.

Issue

[19] Even though the plaintiffs raised five issues in their memorandum of appeal, learned counsel for them in a nutshell stated that the issue to be determined by us was whether an assessment before the High Court Judge is the same as an assessment before the SAR or whether O. 37 ROC is relevant/applicable to an assessment by the High Court Judge.

[20] Since the plaintiffs' appeal centered around the provisions of O. 37 of the ROC, for ease of reference, the relevant parts of that order is reproduced below:

ORDER 37

ASSESSMENT OF DAMAGES

Assessment of damages by Registrar (O. 37 r. 1)

1. (1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.

(2) On the hearing of the application for directions, the Registrar may, in addition to making such orders as are necessary and appropriate under Order 34, give directions as to time by which a

notice of appointment for assessment of damages shall be filed and such notice upon being filed shall, notwithstanding anything in Order 62, rule 10, be served not later than seven days thereafter on the party against whom the judgment is given. Notice of appointment for assessment of damages shall be in Form 62A.

(3) If the party entitled to the benefit of the judgment fails to comply with paragraph (1), the court may, on the application of the party against whom the judgment is given, proceed to assess damages or make such other order as it thinks just.

(4) The attendance of witnesses and the production of documents before the Registrar in proceedings under this Order may be compelled by subpoena, and the provisions of Order 35 shall, with the necessary adaptations, apply in relation to those proceedings as they apply in relation to proceedings at the trial.

(5) Subject to any direction given by the Registrar pursuant to this rule, the party entitled to the benefit of the judgment shall file a notice of appointment for assessment of damages within six month of the date of judgment.

(6) A party shall not file a notice of appointment for assessment of damages by the Registrar pursuant to this rule unless directions for filing the exchange of affidavit evidence pursuant to Order 34 have been given or complied with, as the case may be.

(7) If that party does not file the notice of appointment for assessment of damages within the prescribed period, any other party may apply for directions.

Certificate of amount of damages (O. 37 r. 2)

2. Where in pursuance of this Order or otherwise damages are assessed by the Registrar, he shall certify the amount of the damages.

…

Power to order assessment by Registrar or at trial (O. 37 r. 4)

4. The court may, in the case of any such judgment as is mentioned in rule 1, order either:

(a) that the assessment of the damages shall be made by the Registrar; or

(b) that the action shall proceed to **trial before a Judge in respect of the damages**,

and where the court orders that the action shall proceed to trial, Order 34 shall apply with the necessary modifications.

…

(emphasis added)

[21] Essentially, both the plaintiffs and the defendant had raised the same arguments before the learned JC as before us and we will not repeat them here. Suffice for us to address the issue/issues raised before us and to give our reasons as to why we had unanimously decided to allow the plaintiffs' appeal.

[22] In the first place, it must be remembered that on 16 February 2017, this court had allowed the plaintiffs' appeal against the setting aside of encl. 68 (applied for by the defendant in encl. 69 and allowed by the learned High Court Judge) and as a result of allowing the appeal, this court had in effect reinstated encl. 68. What this means is that the learned JC is required to hear fully encl. 68 and should not have entertained further preliminary objections raised by the defendant. However, the learned JC continued to hear the defendant's preliminary objection and allowed it and thus encl. 68 was struck out. To us, and with respect, the learned JC had overruled/ignored/countermanded this court's decision dated 16 February 2017 when he had no jurisdiction to do so. For this reason alone, we were of the view that the plaintiffs' appeal must be allowed.

[23] We further agreed with the plaintiffs' counsel's contention that there is a difference between a High Court Judge and the Registrar/SAR. Order 37 of the ROC provides for the assessment of damages before the Registrar. However, the learned JC resorted to the definition of "judge" in the ROC to come to the conclusion that if a "judge" includes a "Registrar", then wherever the reference to a "Registrar" in the ROC must also mean it refers to a judge/JC of the High Court. With respect, we found this interpretation of O. 37 to be fallacious for the following reasons:

(i) Order 37 does not provide a different meaning to the term "Registrar" to include a judge of the High Court. Therefore, resort must be made to the general definition provision as provided in O. 1 r. 4 to that term "Registrar";

(ii) under O. 1 r. 4(1), "Registrar" has been defined as follows:

> "Registrar" means:
>
> (a) the Chief Registrar or the Deputy Chief Registrar of the Federal Court;
>
> (b) the Registrar of the High Court of Malaya or the Registrar of the High Court of Sabah and Sarawak;
>
> (c) any Deputy Registrar or Senior Assistant Registrar of the High Court; or
>
> (d) any Registrar of the Subordinate Court under the Subordinate Courts Act 1948;

It can therefore be clearly seen that the SAR is included in the term "Registrar", but definitely does not include the High Court Judge/JC;

(iii) the distinction between the terms used in O. 37 to mean the "Registrar" and the "judge" can also be clearly seen in O. 37 r. 4(b) as against the r. 4(a) where a reference is made first of all in r. 4(a) to "that the assessment of the damages shall be made by the Registrar; or", and r. 4(b) makes reference to "that the action shall proceed to trial before a judge in respect of the damages, …". If the term "Registrar" is to include a "judge", this distinction would not be required at all in r. 4;

(iv) the COA order (dated 12 April 2013) moreover had ordered damages to be "assessed by the court or by the Deputy Registrar or the Senior Assistant Registrar"; this can only mean that this court had ordered the assessment of damages to be tried before a judge/JC of the High Court as one of the possibilities - see definition of "court" in O. 1 r. 4(2) of the ROC which states as follows:

> (2) In these Rules, unless the context otherwise requires, **"court"** refers to the Magistrate's Court, or any one or more Magistrate thereof, the Sessions Court, or any one or more Judges thereof, **the High Court or any one or more Judges or Judicial Commissioners thereof**, whether sitting in court or in Chambers; but the foregoing provision shall not be taken as affecting any provision of these Rules and, in particular, O. 32, rule 9, by virtue of which the authority and jurisdiction of the Registrar of the court is defined and regulated;

(v) flowing from sub-para. 23(iv) above, it cannot be said that there was no provision made by the judgment as to how the assessment of damages is to be assessed so as to enable the provisions of O. 37, in particular r. 1(1), to apply;

(vi) we noted the provisions of O. 32 r. 9 of the ROC, which provides as follows:

> Jurisdiction of Registrar (O. 32 r. 9)
>
> 9. The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act of these Rules *may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Judge may from time to time direct to be transacted or exercised by a Judge in person* or as may by any of these Rules be expressly directed to be transacted or exercised by a Judge in person.
>
> (emphasis added)

Order 32 is headed "applications and proceedings in chambers". The term "Chief Judge" referred in r. 9 thereof had been defined in s. 3 of the Courts of Judicature Act 1964 (Act 91) (CJA) (the definition of "Chief Judge" in the CJA applies since the ROC is made pursuant to s. 17 of the CJA) to mean:

> "Chief Judge" means the Chief Judge of the High Court in Malaya or of the High Court in Sabah and Sarawak, as the case may require;

Moreover, in view of the Chief Judge of Sabah and Sarawak's instruction to the learned SAR (which has been alluded to in para. 11 above), encl. 68 has to be heard before the learned JC in person;

(vii) the learned JC relied heavily on the decision of this court in *Tetuan Sri Ling & Associates* (*supra*) to conclude that O. 37 applies to a judge or JC. With respect, the learned JC failed to take into account the difference in the facts in *Tetuan Sri Ling & Associates* as against the case before us. In the former, the judgment in default order (which was in favour of the respondent/LMW) required the appellant to pay the respondent damages to be assessed by the Deputy Registrar. By the definition of "Registrar", it would also include the Deputy Registrar for the purposes of O. 37. Therefore, the judgment of this court in that case was consonant with our interpretation of O. 37 as laid out by us in the subparagraphs before this. The facts of the case before us are therefore distinguished from that case;

(viii) in view of sub-paras, 23(i) to 23(vii) above, we found that O. 37 generally does not apply to the plaintiffs' case, even though they had filed an application in encl. 68 before the learned SAR.

[24] As O. 37 generally does not apply to the plaintiffs' case, the plaintiffs are at liberty to pursue the same application in encl. 68 before the learned JC, and by virtue of O. 37 r. 4 it is provided that "where the court orders that the action shall proceed to trial, O. 34 (pre-trial case management) shall apply with the necessary modifications".

Conclusion

[25] In conclusion, for the reasons stated above, we answered the issue posed by the plaintiffs in the negative. We therefore unanimously allowed the plaintiffs'/appellants' appeal with costs of RM3,000 subject to the payment of allocatur fees. We set aside the High Court Order dated 28 April 2017. We consequentially ordered encl. 68 to be remitted back to the High Court for hearing before the learned JC/judge.